Supreme Court, U.S.
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No. 00-996

IN THE

Supreme Court of the United States

ASHER RUBINSTEIN,

Cross-Petitioner,

v.

THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, PAUL MICHAEL LYNCH, and WILLIAM C. VAN BUSKIRK,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

G. PHILLIP SHULER
Counsel of Record
JULIE D. LIVAUDAIS
DOUGLAS L. GRUNDMEYER
RICHARD B. RAMIREZ
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
Attorneys for Cross-Respondents
1100 Poydras Street
Suite 2300
New Orleans, LA 70163-2300
(504) 585-7000

165140

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Cross-Respondents, The Administrators of the Tulane Educational Fund, Paul Michael Lynch, and William C. Van Buskirk, disagree with Conditional Cross-Petitioner's questions presented for review. The appropriate questions are:

I. Under *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), should a plaintiff-employee be permitted to present his Title VII claims to a jury when he cannot present sufficient evidence as a matter of law to show that his employer's non-discriminatory reasons for denying him increased pay raises and a promotion are false?

II. Should this Court address the viability of the "stray remarks" doctrine in a Title VII case where the court of appeals' opinion need not and arguably did not rely upon that doctrine to affirm the summary dismissal of the employee's discrimination claims?

III. Under *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), should this Court grant plaintiff's conditional cross-petition seeking to restore a $75,000 punitive damage award where the court of appeals remitted the award to $25,000 and where on remand to the district court plaintiff chose "under protest" to accept the remitted amount in lieu of a new trial?

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OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

The Administrators of The Tulane Educational Fund, Paul Michael Lynch, and William C. Van Buskirk (collectively, "Tulane") urge this Court to deny Asher Rubinstein's Conditional Cross-Petition for a Writ of Certiorari in this case. In its original Petition for a Writ of Certiorari, No. 00-789, filed on November 13, 2000 and now pending in this Court, Tulane seeks review of the Fifth Circuit's decision that affirmed the district court's judgment against Tulane on Rubinstein's Title VII retaliation claim concerning a pay-raise denial in 1997-98, the only claim tried on the merits in this case, and that further remitted a $75,000 punitive damage award to the sum of $25,000. In his Conditional Cross-Petition for Certiorari, Rubinstein now asks this Court to overturn the Fifth Circuit's affirmance of the district court's summary-judgment dismissal of his discrimination claims alleging that Tulane denied him other raises and a promotion because of his national origin and religion as a Russian Jew and to restore the original punitive damage award on his retaliation claim. As explained herein, Rubinstein states no valid reason for this Court to grant him relief.

The court of appeals correctly affirmed the district court's summary dismissal of Rubinstein's claims of religious and national origin discrimination, all of which are unfounded in fact and law. Under this Court's three-part test from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), even assuming that Rubinstein had established a prima facie case of discrimination, Tulane refuted that case by presenting substantial evidence of non-discriminatory reasons for denying him pay raises and a promotion.

Summary judgment was warranted because Rubinstein then failed to meet his burden of providing sufficient evidence to prove that Tulane's reasons were pretextual. In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000), this Court has reconfirmed the *McDonnell Douglas* test and emphasized that each claimant's situation must be evaluated on a case-by-case basis. A prima facie case, combined with some evidence of pretext, may not always be sufficient to create an issue for the trier of fact. *Reeves*, 120 S. Ct. at 2109. In affirming the summary judgment in this case, the Fifth Circuit correctly applied this Court's analysis in *Reeves*.

Moreover, Rubinstein has waived his right to complain that the Fifth Circuit erroneously remitted his punitive damage award on his sole remaining claim of retaliation under Title VII. On remand in the district court, he accepted the remittitur "under protest" before seeking conditional certiorari review in this Court. In *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649-50 (1977), this Court reaffirmed its longstanding rule that a plaintiff cannot "protest" a remittitur that he has accepted and thereafter attempt to reinstate the original verdict through later appellate review.

STATEMENT OF THE CASE

For the sake of brevity, Tulane adopts and incorporates herein its Statement of the Case from its Petition for a Writ of Certiorari, No. 00-789. Tulane provides the following additional undisputed facts that are relevant to the summary dismissal of all of Rubinstein's discrimination claims:

Rubinstein became a member of Tulane's engineering faculty in January 1987. After he taught one course that

semester, his students unfavorably evaluated his effectiveness as a teacher. The engineering Department Chair, Harold Sogin, informed Rubinstein at that time that he, the Dean, and the Provost were concerned about Rubinstein's "problems meeting our expectations for teaching." (R.2, 369). Nonetheless, Sogin recommended that Rubinstein be appointed for a second year with certain reservations. (R.2, 371).

Rubinstein became eligible for tenure in 1989. Sogin and Dean Harold Thompson recommended that Rubinstein be granted tenure, but again not without reservations. Both Sogin and Thompson outlined their concerns about Rubinstein's ineffectiveness as a teacher. Sogin's memorandum concerning tenure explained that "the student evaluations have been disappointing" and that there is no "hard evidence" that Rubinstein is an outstanding teacher or even an average teacher. (R.2, 371). The Dean's memorandum recommending that Rubinstein be awarded tenure similarly indicated that he made the tenure recommendation "with more uncertainty than I wish were the case" and concluded that the School of Engineering will "have to exercise considerable care about the assignment of Dr. Rubinstein to introductory courses" in the future. (R.2, 337).

If Rubinstein had not received tenure, he would have been terminated. (Tulane Faculty Handbook, Art. III, § 3; R.2, 337). Rubinstein's peers concluded that his ineffective teaching was not so problematic that the drastic step of termination was necessary. But Rubinstein's ineffective teaching skills were consistently and sufficiently problematic to prevent his promotion to Full Professor and to affect his annual salary increases.

Although Rubinstein admitted that some faculty members never achieve the rank of Full Professor and that often there is no salary difference between an associate and full professor (R.2, 385), he began seeking the rank of Full Professor a mere ten months after achieving tenure. The Faculty Handbook defines the rank of Full Professor as an appointment that recognizes a professor of outstanding quality who is a mature scholar of national or international standing and a successful teacher with a record of service to the University. (R.2, 338). Rubinstein's status as an Associate Professor, one step below Full Professor, is defined in the Handbook as being "accorded to an individual who has attained scholarly distinction of high quality as demonstrated by teaching and by published scholarly work. Both areas of accomplishment are essential: high academic achievement in one cannot compensate for deficiencies in the other." *Id.*

Rubinstein sought promotion to Full Professor in 1990, 1993, 1995, 1996, and 1997. Each time the question of Rubinstein's promotion arose, a number of experienced faculty colleagues considered Rubinstein's: (1) teaching effectiveness; (2) scholarly and professional achievement; and (3) University citizenship, as outlined in the Statement of Qualifications for Tenure and Promotion (R.2, 363). The Statement of Qualifications also indicates that no faculty member with marginal effectiveness in teaching can be considered favorably for the rank of Full Professor. (R.2, 364). At the end of each semester, Tulane's engineering students evaluate their professors on standardized forms. The Dean's Office assimilates this information and compiles a five-year average for all faculty on Question 26/16, which inquires about a professor's overall teaching effectiveness. (Supp. R. 77; Plaintiff's Exhibit 105). The five-year average ranked Rubinstein in the bottom third of all engineering faculty. (R.2, 345).

After carefully considering the Statement of Qualifications categories through various levels of review, Rubinstein's colleagues consistently declined to promote him. Dean Thompson, Rubinstein's sole supporter in his quest for promotion, explained that the students' course evaluations are one measure of teaching effectiveness and that Rubinstein "had some of the worst evaluations . . . so my colleagues had a right to review that and the right to vote 'no' on the basis of that." (R.2, 439-40, 443). Professor Watts and Professor Mehrabadi, a native of Iran, confirmed that the Statement of Qualifications governs promotion decisions and that faculty with marginal teaching effectiveness will not be favorably judged. (R.2, 495, 501).

In addition to the students' unfavorable evaluations of Rubinstein's teaching, Associate Dean and Mechanical Engineering Professor Efstathios E. Michaelides, who became the Department Chair upon Sogin's 1990 retirement, indicated that students often came to him personally to complain that Rubinstein was unavailable, unsupportive, and intimidating — qualities indicative of poor university citizenship. (R. 2, 451-453). Furthermore, the faculty noted that Rubinstein did not mentor doctoral students, that his courses did not attract many students, and that he had not performed admirably as the Chair of the Seminar Committee (R. 2, 456-57).

Michael Lynch, who succeeded Michaelides as Department Chair, indicated that concerns about teaching effectiveness and University citizenship directly affected Rubinstein's salary and promotions. (R.2, 468). Lynch explained that since 1987, he has heard students complain that Rubinstein was intimidating, rude, and unprepared, and embarrassed students who do not know the material.

(R.2, 470-75). Lynch also described Rubinstein's strained relationships with the faculty, including derogatory and condescending comments he made toward them. (R.2, 481).

Finally, Tulane presented evidence that Rubinstein was a well-paid Associate Professor and that his annual raises, not unlike consideration for a promotion, were linked with his performance. (R.10, 2000; R.2, 468). Because his teaching effectiveness continuously ranked in the bottom third of the engineering faculty, Rubinstein sometimes received lower salary increases that his colleagues. (R.2, 502).

Notwithstanding his ineffective teaching and poor university citizenship, Rubinstein claims that his failure to receive higher pay raises and a promotion were due to some discriminatory animus toward him based on his Jewish religion and Russian national origin. But Rubinstein must stretch so far to come up with any example of discrimination that he complains that Professor Watts called him a "commie" and a "Russian Yankee" and made anti-Semitic remarks. Watts explained this interchange as follows:

> I have a friendly relationship with Asher Rubinstein, and over the years have socialized with him on numerous occasions. On some of those occasions, minor teasing would occur between the faculty members present. I occasionally called Asher Rubinstein a "commie"; Rubinstein occasionally called me a "redneck." However, I never said anything to Asher Rubinstein that I intended to be insulting or that Rubinstein appeared to be, or in any way indicated that he was, insulted by.

(R.2, 500). Rubinstein's only additional evidence was a remark uttered by Professor Bruce, who said to another professor that if "the Russian Jew" could obtain tenure, then anyone could. (R.4, 765). But as the Fifth Circuit recognized, this does not amount to evidence that casts any doubt on the veracity of Tulane's reasons for denying Rubinstein a promotion and additional increases in salary. (Appendix A, pp. 12a-13a, Tulane's Petition for a Writ of Certiorari, 00-789).

The barriers to Rubinstein's promotion and a higher salary were his consistently ineffective teaching and his substandard university citizenship. Tulane refused Rubinstein's five requests for promotion without regard to his national origin or religion simply because his shortcomings were apparent to three successive Department Chairs, two Deans, and two Provosts, and to his faculty peers of varying national origins themselves. As Dean Van Buskirk explained, thirty-four percent of the faculty are foreign-born, and in Rubinstein's department, four of the nine faculty members are foreign-born. (R.2, 343). Of the four Full Professors in Mechanical Engineering (Lynch, Michaelides, Watts, and Mehrabadi), two are foreign-born. Tulane maintains no information as to the religion of its employees.

The district court thoroughly reviewed all of Rubinstein's summary-judgment "evidence" and found that he had not come forward with sufficient proof "from which a reasonable jury could find that defendants discriminated against him on the basis of his religion or national origin in failing to grant him a full-professorship or a higher salary." (R.7, 1586). Because Rubinstein had failed to carry his burden of proof under Title VII, the court of appeals properly affirmed that ruling. The evidence clearly shows that Tulane had legitimate,

non-discriminatory and non-retaliatory reasons for denying Rubinstein a promotion to Full Professor and certain increases in salary. Rubinstein's evidence was insufficient as a matter of law to prove that these reasons were pretextual.

REASONS FOR DENYING THE CONDITIONAL WRIT

I. Rubinstein's Evidence of Discrimination was Legally Insufficient under *McDonnell Douglas Corp. v. Green* and *Reeves v. Sanderson Plumbing Products, Inc.*

The well-established three-tier approach that this Court first announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), provides the method for analyzing a Title VII discrimination claim as follows: (1) the plaintiff must establish a *prima facie* case of employment discrimination; (2) the burden shifts to the defendants to produce a legitimate, nondiscriminatory reason for its actions; and then (3) the burden returns to the plaintiff to prove that the reason stated was false. *See also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2104-05 (2000); *Polanco v. City of Austin, Tex.*, 78 F.3d 968, 975-76 (5th Cir. 1996). At all times, the plaintiff retains the burden of persuading the fact finder that discrimination motivated the complained-of employment decision. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Stults v. Conoco, Inc.*, 76 F.3d 651, 657 (5th Cir. 1996).

Under this analysis, a conflict in substantial evidence must exist to create a jury question. *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc); *LaPierre v. Benson*

Nissan, Inc., 86 F.3d 444, 449 (5th Cir. 1996). In considering a motion for summary judgment in the employment discrimination context, evidence is substantial if it is sufficient to allow a rational jury to make a reasonable inference that some protected classification was a determinative reason for the adverse employment decision. *Id.* (*citing Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (en banc)). A mere scintilla of evidence is insufficient to present a question for the jury. *Boeing*, 411 F.2d at 374.

To defeat Tulane's Motion for Summary Judgment, Rubinstein had to produce evidence that, taken as a whole, created a fact issue as to whether Tulane's stated reasons were not the true motivation for the actions or that created a reasonable inference that either his national origin or religion were determinative factors in the employment action. *Grimes v. Texas Dept. of Mental Health & Mental Retardation*, 102 F.3d 137, 143 (5th Cir. 1996). Rubinstein was required to present evidence sufficient to create a reasonable inference of discriminatory intent. *Id.*; *LaPierre*, 86 F.3d at 451. He did not. This Court's ruling in *Reeves* has not changed these requirements.

In the instant case, after reviewing the record, the Fifth Circuit correctly determined that Rubinstein's scanty evidence of discrimination was insufficient to survive Tulane's Motion for Summary Judgment:

> Rubinstein has failed to meet his burden of producing any evidence of discrimination sufficient to survive summary judgment, and his evidence to rebut the non-discriminatory reasons offered by Tulane is not so persuasive so as to

> support an inference that the real reason was discrimination. In fact, the only evidence offered by Rubinstein in support of his claims of discriminatory intent relate to the comments made by Professor Watts, a member of the relevant committees responsible for making promotion and pay-raise decisions, that Rubinstein was a "Russian Yankee" and that Jews are thrifty, as well as an isolated remark by a Professor Bruce, also a member of the relevant committees, that if "the Russian Jew" could obtain tenure, then anyone could.
>
> These comments, standing alone, will not defeat summary judgment on Rubinstein's claims of discrimination in the promotion and pay-raise decisions.

(Appendix A, pp. 12a-13a, Tulane's Petition for a Writ of Certiorari, 00-789).

Rubinstein erroneously contends that *Reeves* confirms that the Fifth Circuit erred in affirming the district court's summary dismissal of Rubinstein's discrimination claims. But the facts of *Reeves* are not analogous to the instant facts, and *Reeves* provides no support for Rubinstein's argument.

In *Reeves*, by introducing evidence that he kept accurate records, the plaintiff successfully proved that the defendant's proffered reason for dismissing him — failing to keep accurate attendance and tardiness records of employees — was pretextual. There, Reeves "made a substantial showing that [his employer's] explanation was false." 120 S. Ct. at 2107.

In the instant case, however, Rubinstein failed to offer sufficient evidence to show that Tulane's reasons for refusing to promote him to Full Professor (poor student evaluations and unfavorable university citizenship) or in refusing to award him raises (in light of his already above-average salary) were false or veiled any discriminatory animus. As the court of appeals recognized, the record substantially supports a finding that Rubinstein is an ineffective teacher. (Appendix A, p. 11a, Tulane's Petition for a Writ of Certiorari, 00-789). The record also contains evidence that Rubinstein was well paid in comparison to his own colleagues as well as other university professors at Tulane and across the nation. (R.10, 2000). Thus, unlike the claimant in *Reeves*, Rubinstein did not present sufficient evidence to rebut Tulane's well-supported, legitimate reasons for denying him a promotion.

Moreover, contrary to Rubinstein's contention, the Fifth Circuit has not issued "a pattern of decisions that contravene the principles expressed in *Reeves*". Rather, Fifth Circuit decisions have properly applied this Court's analysis in *Reeves* and have correctly granted summary judgment or judgment as a matter of law when the claimant could not sufficiently prove that the defendant's proffered reasons were pretextual. This Court has acknowledged that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' " *Reeves*, 120 S. Ct. at 2110 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)).

In *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899 (5th Cir. 2000), the claimant alleged age and race discrimination after being demoted from management to a

staff position. Crawford proved that he was demoted, that he was qualified for the position, that he was within the protected class when he was demoted, and that someone not within the protected class replaced him, thereby establishing a prima facie case under *Burdine*, 450 U.S. at 253 n.6. Formosa then met its burden of producing evidence of non-discriminatory motives for Crawford's demotion by showing that Crawford had experienced an ongoing clash with his supervisor (who was also demoted) and that his department had experienced low productivity and morale and lost two employees, prompting an evaluation. The evaluation revealed that Crawford was not performing his management tasks at a desired level. *Crawford*, 234 F.3d at 901.

The burden then shifted back to Crawford to present " 'sufficient evidence to find that the employer's asserted justification is false.' " *Id.* at 903 (*quoting Reeves*, 120 S. Ct. at 2109). The Fifth Circuit noted that it is "possible for a plaintiff's evidence to permit a tenuous inference of pretext and yet be insufficient to support a reasonable inference of discrimination." *Crawford*, 234 F.3d at 903. The determination of pretext and of whether discrimination was the real reason for the adverse employment action must be made on a case-by-case basis, "depending on the nature, extent, and quality of the evidence." *Id.*

Crawford's evidence of pretext included evidence that *his supervisor's* performance was substandard, but Crawford provided little if any proof that Formosa's reasons for demoting him were false. Thus, even though Crawford had proven his prima facie case by showing that he was replaced by a white male under 40 years of age and that his replacement, though temporary, was not qualified for the promotion, "it would not have been unreasonable for the

company to seek a fresh start in the troubled department." *Id.* Applying both this Court's decision in *Reeves* and the Fifth Circuit's decision in the instant case, the *Crawford* panel ruled that the evidence Crawford offered to rebut the non-discriminatory reasons his employer had produced was " 'not so persuasive as to support an inference that the real reason was discrimination.' " *Id.* at 904 (*quoting Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 400 (5th Cir. 2000)). The Fifth Circuit therefore affirmed the district court's summary dismissal of Crawford's discrimination claims.

Similarly, in *Vadie v. Mississippi State Univ.*, 218 F.3d 365 (5th Cir. 2000), *cert. denied*, 00-806 (1/16/2001), 2001 WL 32522, the claimant, originally from Iran, was a tenured professor in the department of petroleum engineering, though he had completed the course work necessary for a Ph.D. in chemical engineering and had done his dissertation on a chemical engineering topic. After the university eliminated the petroleum engineering department, Vadie applied for positions in the chemical engineering department. But when his application was repeatedly denied, he filed suit against the university alleging discrimination based upon his national origin. The jury found in favor of Vadie, and MSU moved for judgment as a matter of law. The district court denied the motion but the court of appeals reversed on the discrimination claim, finding that Vadie "offered absolutely no evidence of national origin discrimination." *Id.* at 372.

In reaching this result, the Fifth Circuit distinguished the *Vadie* facts from *Reeves*, agreeing that its decision to dismiss Vadie's discrimination claims was not inconsistent with this Court's recent ruling. Quoting from *Reeves*, the *Vadie* Court recognized that " 'if the record conclusively

revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,' " then the claimant has failed to make an adequate showing, and the defendant is entitled to judgment as a matter of law. *Vadie*, 218 F.3d at 373 n.23 (*quoting Reeves*, 120 S. Ct. at 2109).

As in *Crawford* and *Vadie*, the evidence that Rubinstein offered to refute Tulane's reasons for refusing him a pay raise and a promotion simply does not prove that Tulane's reasons for denying a promotion and pay raise were false. The Fifth Circuit correctly recognized in this case that even when considered in the light most favorable to him, Rubinstein's evidence of discriminatory animus is insufficient to survive summary judgment. Without more, Rubinstein could not and did not meet his burden of proof under the *McDonnell Douglas* three-part test, given Tulane's abundant and uncontroverted independent evidence that no discrimination had occurred. *Reeves* has not shifted the plaintiff's burden of proof or amended the law; indeed, the Fifth Circuit appropriately relied upon *Reeves* to support its decision in the instant case, a decision the court of appeals made when looking at the record " 'taken as a whole.' " *Reeves*, 120 S. Ct. at 2110 (*quoting Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Contrary to Rubinstein's assertions, the district court properly granted, and the court of appeals properly affirmed, summary judgment consistent with *Reeves* and in Tulane's favor on all of Rubinstein's claims of discrimination.

II. This Case is Not the Appropriate Vehicle for Evaluating the "Stray Remarks" Doctrine

This Court recently reversed the Fifth Circuit's decision in *Reeves* when the appellate panel failed to review all of the evidence in the light most favorable to the non-mover. The Fifth Circuit had erroneously required Reeves to provide additional, independent evidence (in addition to his evidence of pretext) to survive judgment as a matter of law. By requiring Reeves to provide additional independent evidence, and then finding that the supervisor's age-related comments " 'were not made in the direct context of Reeves' termination[]' " 120 S. Ct. at 2111 (*quoting Reeves*, 197 F.3d at 693), this Court found that the Fifth Circuit had imposed an inappropriate burden on the plaintiff. " '[I]n passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of' the nonmoving party." *Reeves*, 120 S. Ct. at 2110 (*quoting Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949)).

In the instant case, the Fifth Circuit properly applied this Court's opinion in *Reeves* when it held that Rubinstein had "failed to meet his burden of producing any evidence of discrimination sufficient to survive summary judgment, and his evidence to rebut the non-discriminatory reasons offered by Tulane is not so persuasive so as to support an inference that the real reason was discrimination." (Appendix A, p. 12a, Tulane's Petition for a Writ of Certiorari, 00-789). The Fifth Circuit reached this decision prior to its reference to the "stray remarks" doctrine, which was not essential to its holding. In other words, with or without applying the "stray remarks" doctrine to the instant facts, Rubinstein's evidence, unlike Reeves' evidence, did not establish that

Tulane's reasons for denying him a promotion and pay raise were pretextual, even when examined in the light most favorable to him. Therefore the evaluation of any evidence under the "stray remarks" doctrine was unnecessary.

In short, even if this Court's opinion in *Reeves* casts doubt on the viability of the "stray remarks" doctrine, it is not appropriate for review under these circumstances because the Fifth Circuit need not have relied upon that doctrine when it affirmed the summary dismissal of Rubinstein's discrimination claims. Instead, the Fifth Circuit properly applied this Court's ruling in *Reeves* to find that Rubinstein's evidence of discrimination failed to establish pretext. The viability of the "stray remarks" doctrine is not an issue.

III. Rubinstein Has No Basis to Seek Certiorari Review of the Punitive Damage Award

Rubinstein likewise has no basis in his conditional cross-petition to ask this Court to review and reinstate the $75,000 punitive damage award that the Fifth Circuit reduced on remittitur to the sum of $25,000 on his Title VII retaliation claim concerning the denial of a pay raise in 1997-98. On remand to the district court, Rubinstein accepted the Fifth Circuit's remittitur "under protest" rather than choosing a new trial. He thereby waived any right to seek this Court's review of the punitive damage award.

In *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977), this Court reaffirmed its "consistent" and "longstanding rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order that he has accepted." Even if the plaintiff accepts the remittitur "under protest," he cannot

thereafter challenge the remittitur on further appellate review and seek to reinstate the original verdict. *Id.* at 649-650. Although Rubinstein contends that the *Donovan* holding does not apply here because the Fifth Circuit granted the remittitur on appeal rather that the district court, he raises a distinction without a difference. On remand after the Fifth Circuit's opinion, the district court executed the court of appeals' mandate and ordered Rubinstein to choose between accepting the remittitur or undergoing a new trial. Rubinstein gave notice to the district court that he rejects a new trial and "choses [sic] remittitur under protest, with a reservation of rights to seek writs to the United States Supreme Court on the remittitur issue and all other issues in the case." (Appendix 2, Rubinstein's Conditional Cross-Petition for a Writ of Certiorari, 00-996). But despite his "reservation of rights," *Donovan* holds that Rubinstein has waived the right to raise any issue concerning punitive damages or the right to a new trial on any other issue presented in his conditional cross-petition for certiorari.

Thus, the only issues concerning punitive damages properly before this Court are those that Tulane has raised in its original Petition for Writ of Certiorari, No. 00-789. Punitive damages in this case were erroneously awarded and should be struck in their entirety, especially in light of the lower courts' misapplication of the law that applies to Rubinstein's sole-surviving retaliation claim. Hence, if this Court grants Tulane's petition for a writ of certiorari either to consider whether Tulane was entitled to a judgment of dismissal as a matter of law or to consider whether Tulane may present evidence of its good-faith compliance with Title VII under *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) in a new trial, then issues of quantum and standard of review of the punitive damage award are moot. Stated differently, because Rubinstein's conditional cross-petition

for a writ of certiorari may only be granted if Tulane's petition is granted, *see* U.S. Supreme Court Rule 13.5, this Court's decision to grant Tulane's petition would render Rubinstein's punitive damage issues merely hypothetical.

Furthermore, even if these issues were not waived or mooted, Rubinstein's arguments that: (a) his 3.5% prospective pay raise should have been considered when calculating punitive damage; and (b) the 30 to 1 ratio of punitive to compensatory damages was not excessive simply have no basis in law. Additionally, Rubinstein's implicit request for reinstatement of the district court's punitive damage award cannot survive either a *de novo* or an abuse-of-discretion standard of review, and therefore, unlike *Cooper Industries v. Leatherman Tool Group, Inc.*, No. 99-2035, (*cert. granted* 10/10/2000), this Court's review of that issue here is inappropriate.

First, with regard to Rubinstein's argument that prospective damages should have been considered when calculating a punitive damage award, Rubinstein fails to point out that no additional harm was likely to result because he has already been awarded, albeit erroneously, a 3.5% pay raise. The only element of compensatory damages awarded was $2,500 in back pay, which the court of appeals correctly recognized as the appropriate basis for comparison in determining punitive damages. Furthermore, the "harm" that Rubinstein alleges that the court of appeals should have considered, $33,000-$40,000 over the next ten years, is unfounded and has no support in the lost-wage judgment. Rubinstein fails to explain how or why he invokes a ten-year time period to conveniently reach a 2 to 1 ratio, and cross-respondent knows of no justification for this time period.

Second, the 30 to 1 ratio between the punitive damage and compensatory damage awards was clearly excessive and justified a remittitur. Rubinstein has failed to enunciate any reason for this Court to revisit its prior decisions on the ratio issue, especially in light of Rubinstein's failure to prove that punitive damages are even warranted here. In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), this Court found a punitive ratio of 4 to 1 may be "close to the line," though it approved a 10 to 1 ratio in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). More recently in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court again refused to "draw a bright line" when assessing whether the ratio is inappropriate, but it disparaged a possible ratio of 35 to 1 when discussing the grossly excessive award therein.[1] A 30 to 1 ratio is much closer to ratios that this Court has disapproved, and it is grossly excessive here.

Moreover, this Court has pointed out that even though there is no formulaic means by which to determine a "reasonable" punitive damage award, the degree of reprehensibility must come into play when evaluating the award. *BMW*, 517 U.S. at 575. Because Rubinstein has failed as a matter of law to prove that Tulane is even liable, much less that Tulane's actions were reprehensible, malicious, or recklessly indifferent under 42 U.S.C. § 1981a, *any* award of punitive damages is grossly excessive, and the appropriate ratio need not be revisited under the instant facts.

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1. *See BMW*, 517 U.S. at 582 n.35, in which this Court stated: "Even assuming each repainted BMW suffers a diminution in value of approximately $4,000, the award is 35 times greater than the total damages of all 14 Alabama consumers who purchased repainted BMW's."

Finally, though Rubinstein asserts that this Court has granted a writ of certiorari in *Cooper Industries v. Leatherman Tool Group, Inc.*, 99-2035 (*cert. granted* 10/10/2000), to address the standard of review that applies to allegedly constitutionally excessive punitive damage awards, Rubinstein's final attempt at presenting a certiorari-worthy issue in this case also falls short. As the Fifth Circuit noted, Rubinstein did not even respond to Tulane's alternative arguments for a remand or remittitur. (Appendix A, p. 29a, Tulane's Petition for a Writ of Certiorari, 00-789). Moreover, under either a *de novo* or abuse-of-discretion standard of review, the court of appeals should not have condoned an award of *any* punitive damages. Thus, this case is inappropriate for considering any of Rubinstein's arguments seeking to reinstate the original punitive damage award.

CONCLUSION

Rubinstein's conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

G. PHILLIP SHULER
Counsel of Record
JULIE D. LIVAUDAIS
DOUGLAS L. GRUNDMEYER
RICHARD B. RAMIREZ
CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY, L.L.P.
Attorneys for Cross-Respondents
1100 Poydras Street
Suite 2300
New Orleans, LA 70163-2300
(504) 585-7000